STATE OF MICHIGAN

In The

SUPREME COURT

(Appeal from the Michigan Court of Appeals)
(Before Hood, P.J., Holbrook Jr., JJ., and Owens, JJ.)

TAXPAYERS OF MICHIGAN
AGAINST CASINOS, and
LAURA BAIRD

Plaintiffs-Appellants,

v

STATE OF MICHIGAN, et al.,

Defendants-Appellees,

and

NORTH AMERICAN SPORTS
MANAGEMENT COMPANY, INC.,
IV, AND GAMING ENTERTAINMENT,
LLC.

Intervening
Defendants-Appellees,

_____/

BRIEF OF AMICI CURIAE

Supreme Court No. 122830

Court of Appeals No. 225017

Ingham County Circuit Court
No. 99-90195-CZ

BRIEF OF AMICI CURIAE SENATE MAJORITY LEADER KEN SIKKEMA AND SHIRLEY JOHNSON, APPROPRIATIONS CHAIR

Alfred H. Hall (P24477)
Senate Majority Counsel

Michael G. O'Brien (P44255)
Deputy Majority Caucus Counsel
Phillip A. Hendges (P56870)
Pamela S. Haynes (P57358)
Assistants Senate Majority Counsel
Romney Building, 11th Floor
P.O. Box 30036
Lansing, Michigan 48909
(517) 373-3330

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INTEREST OF AMICI CURIAE

The *amici curiae* in this case are duly elected members of the Michigan Senate, who by virtue of their leadership position or committee chairmanship share primary responsibility for making the difficult policy decisions regarding tribal gaming in the state of Michigan and for ensuring that all State appropriations are made as required by Const 1963, art 9, § 17. They are Ken Sikkema, the Majority Leader of the Senate, and Senator Shirley Johnson, the Chair of the Senate Appropriations Committee. This Court has recently granted leave to appeal the Court of Appeals' ruling of November 12, 2002, in this matter and directed the parties to brief, among the issues, whether approval of tribal-state compacts by concurrent resolution is effective in light of Const 1963, art 4, § 22. The *amici curiae* believe that the issue of legislative concurrence has been properly briefed below and that this Court will again be properly briefed by the parties, and accordingly, the *amici curiae* will not address this issue.

The *amici curiae* draw this Court's attention instead to a more fundamental constitutional concern that the Separation of Powers Clause of Const 1963, art 3, § 2 has been violated. This issue has been effectively thrust upon this Court by certain actions of the Governor which have occurred after the Court of Appeals' ruling in this case. Specifically, the Governor has negotiated and signed a purported amendatory tribal-state agreement on July 22, 2003, with one of the tribes involved in this litigation. The Governor has asserted that her unilateral execution of this agreement effectively amended the original subject tribal-state compact and bound the State thereto -- without any legislative oversight or involvement of any kind. The *amici curiae* assert that while the Governor may have the power to negotiate the terms of a tribal-state gaming compact, the Governor cannot bind the State to the resulting terms of any compact absent an express constitutional delegation of legislative authority under Const 1963, art 3, § 2.

The trial court in this case has previously ruled that the amendatory mechanism contained in the subject tribal-state compacts violated the Separation of Powers Clause of Const 1963, art 3, § 2. On appeal, the Michigan Court of Appeals held that the issue was not then ripe for review because no

amendment had yet been attempted and so the issue would not be decided at that time. Subsequent to that ruling, the Governor unilaterally executed an amendment to one of the tribal-state compacts purportedly binding the State to the terms she had negotiated.

The purported tribal-state amendment would also change the payment terms of the tribal-state compact to provide that tribal payments to the State would no longer be made "*to the Michigan Strategic Fund*" but rather "*to the State, as directed by the Governor.*" The *amici curiae* believe this change violates the appropriations provisions of Const 1963, art 9, § 17.

The *amici curiae* contend that these actions of the Governor render the previously unresolved issue ripe for review at this time. Moreover, because the Administration has indicted its intentions to use this amendatory agreement as a model for future negotiations with other tribes, the *amici curiae* believe immediate resolution of this issue is necessary in the interests of judicial economy in order to avoid repeated violations of Const 1963, art 3, § 2, and Const 1963, art 9, § 17.

The *amici curiae* believe the resolution of these legal questions involve constitutional principles of great significance concerning the Separation of Powers Clause. The *amici curiae* possess a strong interest in preserving the legislative powers and prerogatives under the Michigan Constitution. The *amici curiae* are gravely concerned that these actions by the Governor usurp legislative authority under the Michigan Constitution and constitute *ultra vires* actions.

Because a tribal-state compact is deemed invalid under federal law if the State official(s) executing the agreement is not authorized to bind the State to the terms of the agreement, the *amici curiae* assert that the purported amendatory agreement is a legal nullity.

The *amici curiae* respectfully request for all the reasons discussed, *infra,* that the Court declare that the Governor may not unilaterally bind the State to a tribal-state gaming compact or amendment and that any such agreement is null and void under Const 1963, art 3, § 2. In addition, the *amici curiae* request that the Court declare that the payment terms of the purported amendatory agreement usurp the Legislature's appropriations power under Const 1963, art 9, § 17.

STATEMENT OF QUESTIONS PRESENTED

Should this Court rule that:

I. The Governor of Michigan may not unilaterally amend the terms of a tribal-state gaming compact previously agreed to by the Michigan Legislature where Article 3, Section 2 of the Michigan Constitution permits the delegation of such legislative authority *only if* it is specifically authorized by an *expressed provision* of the Constitution and no such express provision of the Constitution exists.

The Trial Court held that the answer is "YES".

The Court of Appeals did not decide this issue.

The Plaintiffs-Appellants contend the answer should be "YES."

The Defendant-Appellees would presumably contend the answer should be "No."

The Amici Curiae contend the answer is "YES."

II. The tribal gaming payment mechanism contained in the purported amendatory agreement executed by the Governor violates the Appropriations Clause of Article 9, Section 17 of the Michigan Constitution and corresponding statutes because it would impermissibly permit the Governor to divert State funds without obtaining a prior legislative appropriation.

The Court of Appeals did not decide this issue.

The Plaintiffs-Appellants would presumably contend the answer should be "YES."

The Defendant-Appellees would presumably contend the answer should be "No."

The Amici Curiae contend the answer is "YES."

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The *amici curiae* submit this brief in support of their motion as this proceeding implicates fundamental constitutional questions of great public importance. Moreover, an early resolution of this dispute is desirable to prevent confusion and uncertainty as to the proper constitutional role(s) of the Governor and the Michigan Legislature in terms of formulating the State's public policy on tribal gaming and binding the State to the terms of tribal-state agreements and to ensure that any State revenues generated from tribal gaming are expended by the State in conformity with applicable constitutional and statutory appropriation proscriptions. Because the Governor has indicated her intentions to use this purported agreement as a model to amend existing compacts with other Michigan tribes to expand gaming in the state, the *amici curiae* assert that it is critical that this issue be resolved now so as to eliminate these potential sources of uncertainty and confusion in the regulation of tribal gaming in Michigan and in the interests of judicial economy.

STATEMENT OF FACTS

Throughout the late 1980s and the early 1990s, federally recognized Indian tribes in Michigan negotiated with the State to enter into gaming compacts in accordance with the federal Indian Gaming Regulatory Act of 1988 (IGRA), 25 USC Section 2701 et seq. Congress enacted the IGRA to create a framework within which federally recognized Indian tribes could operate casino-style gaming activities.

In 1993, seven Michigan tribes (the Sault Ste. Marie Band of Chippewa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, the Keweenaw Bay Indian Community, the Hannahville Indian Community, the Bay Mills Indian Community, the Saginaw Chippewa Indian Tribe, and the Lac Vieux Desert Band of Lake Superior Chippewa Indians) that had previously sued the State for the right to operate gaming activities entered into a Consent Judgment dismissing the suit in exchange for Class III gaming compacts under the IGRA.

On December 11, 1998, the Michigan Legislature adopted a concurrent resolution approving compacts with four more tribes -- the Huron Band of Potawatomi Indians, the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, and the Little Traverse Bay Band of Odawa Indians (the Odawa Tribe) -- that had received federal recognition after the date that the 1993 compacts were approved by the Michigan Legislature. The 1998 compacts -- including the original compact with the Odawa Tribe -- mirrored the original seven compacts implemented in 1993 with the following exceptions of particular note:

- The 1998 compacts limit the four tribes to *one* casino on their tribal lands;
- The four 1998 tribes are required to continue to pay 8 percent of the net wins to the Michigan Strategic Fund (MSF) so long as no change in state law permits the operation of electronic games of chance beyond that already allowed for the three Detroit casinos; and
- The Governor, "acting for the state," was authorized to submit compact amendments for consideration to the tribes and receive proposed amendments from the tribe.

Both the 1993 compacts and the 1998 compacts were ratified by the Michigan Legislature through concurrent resolutions. The Attorney General ruled in OAG, 1997, No. 6960 (including a peculiar "Clarification" contained in a press release issued a few days later) that any future compacts in Michigan would have to be approved via legislation.

The current lawsuit was then filed challenging the use of a resolution as a proper means of the Legislature approving the negotiated tribal gaming compacts. One of the issues argued at the trial level in this matter was whether the amendatory mechanism of the tribal-state compacts violated the Separation of Powers Clause of Const 1963, art 3, § 2. The trial court ruled that the compact language did violate the Separation of Powers Clause, but the Michigan Court of Appeals subsequently ruled that the issue was not yet ripe for review because no amendment had yet been attempted. The Governor's efforts to amend the compact with the Odawa Tribe on July 22, 2003, have ripened the issue for immediate review.

The purported July 22 agreement between the Governor and the Odawa Tribe would allow the Tribe to operate a second casino in the Mackinaw City area in addition to its "Victories Casino" located just south of Petoskey. The proposed amendatory agreement would also make the following substantive changes to the Tribe's 1998 Compact with the State:

- ***Extends the term*** of the Compact from 20 to 25 years.
- ***Provides less restrictive limitations on gaming*** by requiring the Tribe to make semi-annual payments to the State, but now only so long as the State does not authorize new gaming in ten specified counties (Emmet, Cheboygan, Charlevoix, Antrim, Otsego, Crawford, Kalkaska, Presque Isle, Montmorency, and Oscoda) rather than the statewide limitation required under the 1998 Compact.
- ***Requires semi-annual payments be made "as the Governor so directs"*** -- rather than to the MSF.
- Increases percentage used in determining the semi-annual payment amounts at the second site from a flat 8 percent of the net win from all Class III electronic games of chance at the existing casino to 10 percent of the first $50 million and 12 percent of any amount over $50 million from these sources at the new facility.

The propriety of the Governor's attempt to unilaterally rewrite the tribal-state gaming compacts and thereby bind the State thereto under Const 1963, art 3, § 2, and redirect State appropriations under Const 1963, art 9, § 17, is the subject of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

One of the gaming issues at the forefront of public debate in Michigan involves the possible renegotiation of tribal gaming compacts to increase payments to the State. For public officials facing tough budgetary decisions, amending the compacts may appear to be a minimally offensive response to an otherwise overwhelming problem.

In an apparent response to these concerns, the Governor signed the July 22, 2003, agreement with the Odawa Tribe. The agreement is purportedly based on the provisions of the 1998 Compact which state the Governor may *"act on behalf of the state"* in negotiating amendments to the agreement.

The Administration has taken the position that no formal action by the Legislature is required because the Legislature had previously delegated its approval authority to the Governor through its concurrence in the 1998 compacts. However, while the legislative approval of the 1998 compacts was previously determined by the Michigan Court of Appeals in this matter to be a contractual function which can be approved by resolution, the delegation of legislative approval authority over future amendments to a compact is *not* a contractual issue. Rather, it is a delegation of a constitutionally prescribed legislative authority to a separate branch of government. Article 3, Section 2 of the Michigan Constitution indicates that the power of government is divided into three branches of government and that no person exercising the powers of one branch can exercise the powers properly belonging to another branch except as expressly authorized in the Constitution. There is no express provision of the Michigan Constitution authorizing the delegation of the legislative approval authority over compact amendments to the Governor.

The Administration has indicated its intention to use this agreement as a model for negotiations with three other tribes that operate casinos pursuant to the 1998 compacts and believes that the amendment, having been approved by the Tribe and by the Governor without any action by the Michigan Legislature, now need only be submitted to and approved by the Secretary of the Interior and published in the Federal Register to become effective pursuant to 25 USC 2710(d).

The Administration asserts that the Governor is the State's sole representative in amending the Tribe's gaming compact because the Legislature -- by concurring in the 1998 Compact -- has delegated to the Governor its power to have any role in the approval of compact amendments. However, it is unclear from the actual language of the 1998 Compact that the Legislature has delegated its ability to approve future compact amendments and, thus, has no role in approving future compact amendments. *Even if* the 1998 Compact had expressly designated the Governor as the State's sole representative in executing any amendment, such a delegation of authority would be unconstitutional. The Separation of Powers Clause of the Michigan Constitution provides that such a delegation can take place *only if* it is specifically authorized by an *express* provision of the Constitution. The Constitution contains no such expressed provision, and the Governor's attempted exercise of such authority in the absence of such a provision violates Article 3, Section 2.

In addition, the Governor's actions run afoul of the mandates of Article 9, Section 17, and MCL 21.161 because the agreement purports to provide that revenue from the second casino be distributed *"as directed by the Governor or designee."* This insulates the distribution of revenue from any oversight by the Legislature despite the fact that the money is presumably to be deposited in the State Treasury, and Article 9, Section 17 of the Michigan Constitution requires that no money be paid out of the State Treasury except in pursuance of appropriations made by law. Thus, even if the Michigan Constitution explicitly authorized the Governor to unilaterally bind the State to an amended gaming compact, she would still be unable to direct the expenditures of State funds in the manner contemplated.

Together, these factors demonstrate the lack of proper constitutional and statutory authority for the Governor to execute the amendatory agreement without the involvement and approval of the Michigan Legislature.

ARGUMENT

I. A TRIBAL-STATE GAMING COMPACT IS VOID UNDER THE IGRA WHERE A STATE OFFICIAL, LACKING THE REQUISITE STATE AUTHORITY TO BIND THE STATE, ACTS UNILATERALLY IN SIGNING SUCH AN AGREEMENT.

Under the IGRA (25 USC 2701 et seq.), a tribe may conduct gaming activities on "*Indian lands*" only if those activities are:

> "(A) Authorized by an ordinance or resolution that --
> (i) Is authorized by the governing body of the Indian tribe having jurisdiction over such lands;
> (ii) Meets the requirements of subsection (b) of this section; and
> (iii) Is approved by the Chairman.
> (B) Located in a state that permits such gaming for any purpose by any person, organization, or entity, and
> (C) Conducted in conformance with a ***tribal-state compact*** entered into by the Indian Tribe and the **State** under paragraph (3) that is in effect." (25USC 2710(d)(1)). (Emphasis added)

Further, Section 2710(d)(3)(b) of IGRA, which addresses contract negotiations, states: "Any ***State*** and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register."

Nothing in the IGRA specifies which State official(s) may sign a gaming compact on behalf of a ***State*** within the meaning of Sections 2710(d)(1) and 2710(d)(3)(b). In fact, nothing in the IGRA even suggests that Congress intended that the Secretary determine who is authorized to execute compacts on behalf of states. Case law indicates IGRA's silence on this point is due to the fact that it would be unreasonable to expect that potentially complex questions of this nature could be adequately addressed by the Secretary of the Interior. *Pueblo of Santa Anna v Kelly*, 932 F Supp 1284, at 1293 (D.N.M. 1996). Because the IGRA is silent on this issue, state law determines the procedures for executing valid gaming compacts. *Pueblo, supra at 1294* citing: *Washington v Confederated Bands and Tribes of the Yakima Indian Nation*, 439 US 463, 99 S Ct 740, (1979).

Once a tribal-state gaming compact is signed, the IGRA provides that the Secretary may only disapprove it for one or more of three deficiencies: a violation of IGRA; a violation of another federal

law; or a violation of the trust obligations of the United States. 25 USC 2710(d)(8)(B). In the absence of one of these violations, the Secretary must approve the compact. However, more important in the instant case is the IGRA's provision that a compact would be deemed approved, with or without the Secretary's approval, if the Secretary fails to act within 45 days of the submission of the compact. Section 2710(d)(8)(C).

Simply because a compact is deemed approved under Section 2710(d)(8)(C) due to the Secretary's inaction, the compact may not be operational. Compacts approved under Section 2710(d)(8)(C) are nonetheless void, as a matter of law, where the State officials who sign the agreements do not possess the requisite authority to bind the State to the compact. As the Court in *Kickapoo Tribe of Indians v Babbit*, 827 F Supp 37 (D.D.C 1993), *rev'd on other grounds*, 43 F3d 1491(D.C.Cir. 1995), ruled:

> "The fact that the compact is deemed approved, however, does not mean that the compact necessarily is binding and operational. Rather, as defendant's next argue, even if the compact is deemed approved it nonetheless may be void if the Governor's inability to bind the State of Kansas renders the compact invalid. Since Section 2710(d)(8)(C) states that the compact is deemed approved "only to the extent that the compact is consistent with the provisions of this chapter [i.e., IGRA]," if the compact conflicts with any provision of IGRA, the fact that the Secretary failed to act within the forty-five day approval period is irrelevant; the compact still would be void." 827 F Supp at 44. (Emphasis added)

The Court in *Kickapoo* took note of the fact that the Supreme Court of Kansas had ruled that while the Governor possessed the power to negotiate a compact, she did not have the power to sign the resulting compact. Relying upon this ruling, the Court found that as a matter of federal law, the State never entered into a compact as required by IGRA:

> "[T]he court concludes that the State of Kansas never entered into a compact as required by 25 U.S.C. Section 2710(d)(8)(A). The court accepts the determination of the Supreme Court of Kansas that the Governor did not have the authority to bind the State. As discussed above, the compact may be deemed approved only to the extent that it comports with IGRA. [citation omitted]. And because only the Governor -- a person without authority -- signed the compact, the State did not enter into the compact. Thus, the compact does not comply with Section 2710(d)(8)(A) and is invalid. In sum, although the compact initially is deemed approved due to the statutory mechanism of Section 2710(d)(8)(C), it ultimately is invalid due to the fact that it conflicts with Section 2710(d)(8)(A). 827 F Supp at 46. (Emphasis added)

The *Pueblo* court *supra*, echoed this rationale when it concluded that in enacting IGRA, Congress did not intend that the Secretary's approval override deficiencies in the compact under state law. Having thoroughly examined New Mexico law, the Court found that the Governor's execution of a gaming compact had encroached upon the legislature's authority contrary to the state constitutional Separation of Powers Clause and the compacts were thus invalid. In reconciling this finding with the 45-day approval mechanism under IGRA, the Court held: "[T]he Secretary's approval is a separate requirement that puts a valid compact into operation. The Secretary's approval cannot in itself validate an otherwise invalid compact." 932 F Supp at 1293.

All Class III tribal gaming activities under the IGRA gaming activities, therefore, must be approved by the appropriate State official(s) in order to be binding. The language of Section 2710(d) makes no distinction between activities conducted pursuant to an original tribal gaming compact with a state or those gaming activities conducted pursuant to an amendment to a compact. The law expressly requires that ***all*** Class III tribal gaming be conducted in conformance with a tribal-state agreement between the tribe and the host ***State.*** It is not enough if only the original compact has been properly approved by the host state. Under the aforementioned language of the IGRA, subsequent compact amendments will also require proper approval by the State for the new or revised gaming activities to go into effect.

As the Michigan Court of Appeals has previously ruled in this case, a review of the plain language of the IGRA reveals that authorization by the Legislature may occur through ordinance or by resolution. Either methodology requires legislative action by either approving a resolution or enacting legislation. Accordingly, whereas under the IGRA, the gaming activities at the second casino in Mackinaw City ***must*** be conducted in conformance with a tribal-state compact between the Tribe and the ***State,*** under Michigan law, the ***State's*** approval ***must*** include legislative authorization of the agreement.

II. THE GOVERNOR'S ATTEMPT TO UNILATERALLY AMEND THE TRIBAL GAMING COMPACT WITH THE ODAWA TRIBE VIOLATES THE SEPARATION OF POWERS CLAUSE OF THE MICHIGAN CONSTITUTION.

A. The Separation of Powers Clause of the Michigan Constitution.

The Michigan Constitution vests the legislative power of the State in the Michigan Senate and House of Representatives, Const 1963, art 4, § 1, and vests the Executive power in the Governor, Const 1963, art 5, § 1. The Constitution also explicitly provides for the separation of government powers:

> "Sec. 2. The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. (Emphasis added)

This provision of Michigan's highest law reflects a principle that is fundamental in the structure of the federal government and the governments of all 50 states. The Separation of Powers Clause rests on the notion that the accumulation of too much power in one governmental entity presents a threat to liberty. *New Mexico ex rel Clark v Johnson*, 904 P2d 11, at 22, 120 N.M. 562, at 573 (1995), citing: *Gregory v Ashcroft*, 501 US 452, 459 (1991).

This Court has staunchly maintained the fundamental purpose of the doctrine. In *Judicial Attorneys Association v Michigan*, 459 Mich 291 (1998), this Court stated that "the doctrine of separation of powers is a shield for each of the branches of government to use for the protection of our form of government and for the people it serves; it is not a sword to be used by one branch against another." 459 Mich at 304. This Court has also recognized that the intent of the doctrine was not that each branch be kept completely distinct and separate from the other branches. However, the purpose of the doctrine is to guard against the danger that the power of one branch could exercise the power of either of the other branches. *In re Southard*, 298 Mich 75.

1. An Express Constitutional Delegation is Needed to Satisfy Article 3, Section 2.

Article 3, Section 2, is not violated when the Constitution expressly grants the powers of one branch of government to another branch. In *Soap & Detergent Association v Natural Resources*

Commission, 415 Mich 728 (1982), this Court acknowledged that Article 5, Section 2 of the Michigan Constitution specifically delegates broad legislative power to the Governor for the purpose of Executive reorganization. However, this Court also recognized that this delegation of legislative power was limited and specific because the Legislature continues to hold the power to transfer functions and powers of the Executive agencies and because the Legislature specifically maintains veto power over Executive reorganization orders. (*Id* at 752)

Similarly, in *House Speaker v Governor*, 195 Mich App 376 (1992), the Michigan Court of Appeals recognized that any legislative power held by the Governor must be expressly granted to him or her by the Constitution. 195 Mich App at 389. The Court noted that the intent of the Constitutional Convention in drafting Article 5, Section 2 was to grant to the Governor the legislative authority to promote an efficient Executive department. Thus, even when the Constitution expressly grants the Governor legislative authority, that authority cannot be abused or overextended.

2. There is No Express Delegation of Legislative Authority to the Governor.

Unlike the express grant of power provision in Article 5, Section 2, in the cases of *Soap & Detergent Association* and *House Speaker*, *supra,* however, the Governor in the instant case can point to no express constitutional provision authorizing her to act alone to amend the 1998 Compact and bind the State. Instead, the Administration points to a provision in the 1998 Gaming Compact which outlines a specific process for completing compact amendments.

This language states the Governor may *"act on behalf of the state"* in certain specified capacities such as receiving and transmitting proposed amendments to the Compact. It does not, however, substitute the Governor for the State as the proper party to the Compact. The amendatory mechanism contains no express delegation of legislative approval authority over future proposed amendments. This is evident from the distinct use of the term "State" in Section 16 of the Compact which set forth the amendment process and the conspicuous absence of the term "Governor" in that section. Nowhere does this section state that the Governor may act alone to bind the State:

"SECTION 16. Amendment.

(A) This Compact may be amended by mutual agreement between the Tribe and the **State** as follows:

The Tribe or the **State** may propose amendments to the Compact by providing the other party with written notice of the proposed amendments as follows:

The Tribe shall propose amendments pursuant to the notice provisions of this Compact by submitting the proposed amendments to the Governor who shall act for the **State.**

The **State,** acting through the Governor, shall propose amendments by submitting the proposed amendments to the Tribe pursuant to the notice provisions of this Compact.

(i) Neither the tribe nor the **State** may amend the definition of "eligible Indian lands" to include counties other than those set forth in Section 2(B)(1) of this Compact. The Tribe's right to conduct gaming under this Compact shall be terminated if any of the following events occur:

(I) the Tribe applies to the United States Department of Interior to have land taken in trust which would qualify for gaming under Section 20 of IGRA (25 U.S.C. Section 2719) and which is within 150 miles of the City of Detroit, other than eligible Indian lands described in Section 2(B)(I) of this Compact,

(II) the Tribe requests the United States Department of Interior to approve a Compact for gaming within 150 miles of the City of Detroit which Compact has not been executed by the **State of Michigan**, or

(III) the Tribe conducts gaming on land within 150 miles of the City of Detroit, other than eligible Indian lands described in Section 2(B)(I) of this Compact.

Termination of tribal gaming under this Section shall be effective as of the date on which the **State** learns or receives notice of any tribal action identified in this Paragraph 16(A)(iii), including notice from any person or entity (including any unit of government) which is given to the addresses identified in Section 13 of this Compact.

(B) The party receiving the proposed amendment shall advise the requesting party within thirty (30) days as follows:

(i) That the receiving party agrees to the proposed amendment; or

(ii) That the receiving party rejects the proposed amendment as submitted and agrees to meet concerning the subject of the provisions of the IGRA.

(C) Any amendment agreed to between the parties shall be submitted to the Secretary of the Interior for approval pursuant to the provisions of the IGRA.

(D) Upon the effective date of the amendment, a certified copy shall be filed by the Governor with the Michigan Secretary of State and a copy shall be transmitted to each house of the Michigan legislature and the Michigan Attorney General." (Emphasis added)

The Administration believes that no formal legislative action is required to approve the Compact amendments because the Legislature had previously delegated its approval authority to the Governor through its concurrence in the 1998 Compact. This interpretation of the 1998 agreement is fundamentally flawed. Not only does it ignore the expressed mandates of Article 3, Section 2, as articulated in *House Speaker*, *supra*, but it also ignores the indisputable truth that the expressed language of Section 16 of the Compact specifically describes the parties to the agreement as the ***State*** and the Tribe -- not the Governor and the Tribe. The Legislature and the Governor -- *acting together* -- constituted the "State" under the 1998 Compact and continue to constitute the "State" today.

Nothing in the aforementioned amendment mechanism provides the Governor a "specific delegation" of legislative authority to unilaterally bind the State to a new agreement. Nor can such an interpretation be inferred. The term "Governor" is used in Section 16 to designate the Governor as the State's contact person for submitting and receiving proposed amendments for the State. This is entirely consistent with the past practice of the Michigan Legislature and the previous Governor in negotiating the terms of the original compacts on behalf of the State prior to submission for legislative approval. A fair reading of Section 16 of the Compact indicates that the language contained therein constitutes a logistical designation of the proper party to receive and submit amendment proposals on behalf of the State given the practical realities of tribal-state compact negotiations.

To act "*on behalf of the State*" in proposing or receiving amendments to gaming compacts neither specifically nor implicitly authorizes the Governor to exclude the Legislature -- an otherwise necessary party to the original agreement -- from taking part in the approval of any amendment(s) to the Compact. A fair reading of the amendatory mechanism of the 1998 Compact simply establishes the Governor as the State's representative in proposing and receiving proposed amendments -- a logistical role similar to the one played by the previous Governor in negotiating the original compacts.

The text of the 1998 Compact also does not expressly preclude the Legislature from taking part in the approval of any Compact amendments, nor should any such preclusion be inferred. It is counterintuitive to assert that the same parties to the 1998 Compact -- the Governor, the Legislature, and

the Tribe -- who are necessary to execute a compact are not the same parties necessary to amend the Compact. It is inconsistent with the basic principles of contract law that provide that any contract, or any amendment to a contract, requires the mutual assent of all the necessary parties to the underlying agreement.

By attempting to unilaterally amend the Compact, the Governor has violated the Separation of Powers Clause because no express constitutional authority exists to specifically authorize the delegation of legislative authority to her that would allow her to exclusively determine the State's public policy on tribal gaming. While acknowledging that the Clause permits some overlap in functions between the three branches of government, the delegation of power must be specific and limited. While the Legislature authorized the Governor to accept and transmit proposed amendments to the 1998 Compact on behalf of the State, it did not specifically delegate its legislative authority to the Governor to bind the State to proposed amendments. The lack of such authority renders the Governor's action *ultra vires* and the purported amendatory agreement a legal nullity.

3. IGRA Case Law Validates the Need for a Specific Delegation of Authority.

The provisions of IGRA neither add nor detract from a State official's authority under state law. The provision of IGRA which authorizes State officials to enter into tribal-state gaming compacts on behalf of the State does not invest state governors with powers in excess of those that governors otherwise possess under state law. If those constitutional and statutory provisions do not authorize a governor to unilaterally enter into such compacts without express legislative approval, then the compacts executed by a governor in the absence of such state authority are without legal effect and cannot be implemented. *Clark, supra* at 904 P2d at 25.

A line of cases from courts in other states reaffirms the general rule that while a governor may have the power to negotiate the terms of a gaming compact with an Indian tribe under the IGRA, a governor cannot bind the State to the resulting terms of any compact absent an express or implied constitutional right or an appropriate delegation of power by the state legislature. See e.g., *State ex rel*

Stephan v Finney, 254 Kan 632; *Clark, supra* 120 NM 562, 904 P2d 11(1995); *Narragansett Indian Tribe of Rhode Island v State,* 667 A2d 280 (1995).

In prohibiting the governor from implementing gaming compacts and revenue sharing agreements entered into without legislative approval under a nearly identical constitutional provision, the New Mexico Supreme Court held in *Clark, supra*, that:

> "[T]he Governor may not exercise the power that as a matter of state constitutional law infringes upon the power properly belonging to the legislature [and that] the test [of constitutionality of such actions] is whether the Governor's actions disrupt the proper balance between the executive and legislative branches. . . . We also find the Governor's actions to be disruptive of legislative authority because the compact strikes a detailed and specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of its operators, and the respective civil and criminal jurisdictions for the State and the Tribe necessary for the enforcement of state or tribal laws or regulations. All of this occurred in the absence of any action on the part of the legislature. While negotiations between states and Indian tribes to address these matters is expressly contemplated under the IGRA [citations omitted], we think the actual balance that is struck represents a legislative function. While the legislature might authorize the Governor to enter into a Gaming compact or ratify his actions with respect to a compact he has negotiated, the Governor cannot enter into such a compact solely on his own authority." 904 P2d at 22. (Emphasis added)

Thus, in some states, the governors may finally execute and bind a state to a tribal gaming compact based on an appropriate delegation of authority by the state legislature. However, that scenario is not possible in Michigan. Article 3, Section 2 of the Michigan Constitution permits the delegation of such legislative authority only if it is specifically authorized by an express provision of the Constitution.

B. Residual Constitutional Authority Resides in the Michigan Legislature.

It is a generally recognized principle of law that residual legislative governmental authority rests with the Legislative Branch rather than the Executive Branch. As the Michigan Court of Appeals has recognized: "*Any* legislative power that the Governor possesses must be expressly granted to him by the constitution." *House Speaker, supra at* 389. (Emphasis added)

So it is that the original Compact adopted by the Michigan Legislature reflected a specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of its operators, the regulation of alcoholic beverages,

imposition of age requirements for participation in gaming activities, revenue payments, and the respective civil and criminal jurisdictions for the State and the Tribe necessary for the enforcement of state or tribal laws or regulations. The Legislature's ability to give input and make policy determinations with respect to these considerations would be summarily negated if the Administration's interpretation is permitted to stand.

As the Court of Appeals has previously noted in this case: "The Governor is constitutionally authorized to present and recommend legislation . . . . There is no prohibition in Michigan law that would bar the Governor's actions in negotiating a gaming compact and *then* presenting it to the Legislature." *Taxpayers of Michigan Against Casinos v State*, 254 Mich App 23, 40, 657 N.W. 2d 503, 512 (2002).

Similarly, the Court of Appeals acknowledged in *Tiger Stadium Fan Club, Inc, v Governor*, 217 Mich App 439, 553 NW2d 7 (1996), that the Governor has the constitutional ability to enter into compacts with Indian tribes, *subject to the approval of the Michigan Legislature*. However, the Governor here has not sought to merely negotiate the purported agreement prior to submission to the Michigan Legislature. Rather, the Governor has sought to expand the scope of her constitutional authority so as to allow her to unilaterally bind the State of Michigan to the terms of an amendatory agreement that she alone negotiated and executed. Such an overt act -- in the absence of a specific grant of constitutional authority -- constitutes *ultra vires* activities under Michigan law. *House Speaker v Governor*, *supra at* 389.

The Michigan Constitution contains no provision -- implicit or expressed -- authorizing the delegation of legislative authority over tribal-state gaming compact approval to the Executive Branch. Thus, as the Governor alone cannot bind the State of Michigan, it follows that the purported amendatory agreement is ineffective to bind the State as required by Section 2710 of the IGRA *unless and until* it is approved by the Michigan Legislature.

Cases from other jurisdictions which have addressed this precise issue have come to similar results. This line of cases distinguishes between a governor's ability to negotiate gaming compacts with Indian tribes versus the heightened constitutional authority needed to bind the State. For example, in

State ex rel Stephan v *Fenney*, 254 Kan 632, 635, 867 P2d 1034 (1994), the Court held that while a governor may negotiate the terms of a proposed agreement, absent "an appropriate delegation of power" by the state legislature, the governor had "no power to bind the State to the terms" of the compact. Similarly, in *Clark, supra,* at 576, the Court held that the governor lacked the constitutional authority to unilaterally bind the State to a compact negotiated by him.

The *amici curiae* recognize that the Governor may advocate, initiate, negotiate, and take any other action, short of executing, a tribal-state gaming compact. Indeed, requiring legislative approval of negotiated compacts has been the established practice in this state up until the current attempt by the Administration to usurp the Legislature's approval authority. Nothing in the 1998 Compact specifically authorizes the Governor to sign the compacts which she negotiates without subsequent legislative approval. Nothing in the 1998 Compact authorizes the Governor to do anything that the previous administration had not done. More importantly, nothing in the Michigan Constitution expressly and specifically authorizes this unprecedented action by the Governor.

C. The Governor's Actions Violate Article 3, Section 2.

Absent a specific authorization from the Michigan Legislature granted pursuant to an express provision of the Constitution authorizing such delegation, the Governor has no constitutional right to finally execute and bind the State to such a compact on her signature alone. Indeed, just as the Court of Appeals decided in *McCartney* v *Attorney Gen.*, 231 Mich App 722, at 726-728, 587 NW2d 824 (1998), that the previous Governor's unilateral actions were not *ultra vires* where he "did not attempt to bind the Legislature or the state to any terms in the compact" which he had negotiated, so it is that the Governor's current unilateral efforts to bind the State to the terms of an amendatory compact which she has negotiated render the Governor's actions *ultra vires.*

The delegation of legislative authority is permitted under Article 3, Section 2 only if it is specifically authorized by an express provision of the Constitution. Yet, the Michigan Constitution contains no provision -- implicit or expressed -- permitting the type of delegation the Governor relies

upon to authorize her unprecedented action. Even if the Constitution "*implicitly*" authorized this action by the Governor, there is no "expressed provision" authorizing this delegation of authority in the Michigan Constitution as required by Article 3, Section 2. The Governor's attempt to exercise such authority in the absence of an expressed grant of constitutional authority, therefore, violates Article 3, Section 2.

The trial court in this case previously ruled that the amendatory mechanism contained in the 1998 Compact did, in fact, violate Article 3, Section 2. On appeal, the Michigan Court of Appeals held that the issue was not yet ripe for review and would not be decided at that time. However, the Governor's attempt this past summer to amend the tribal-state compact with no legislative involvement renders the issue now ripe for review at this time. The Administration's pledge to use the amendatory agreement with the Odawa Tribe as a model for future negotiations with the remaining three Indian tribes that were party to the 1998 compacts makes this Court's immediate resolution of this issue necessary at this time in the interests of judicial economy.

III. THE GOVERNOR'S ATTEMPT TO REWRITE THE TRIBAL GAMING COMPACT WITH THE ODAWA TRIBE VIOLATES MICHIGAN CONSTITUTIONAL AND STATUTORY APPROPRIATIONS PROVISIONS.

While the Governor may -- with the cooperation and under the oversight of the Legislature -- serve as the State's chief negotiator with a tribe seeking a gaming compact or an amendment to an existing gaming compact, the Governor may *not* unilaterally remove from the constitutional legislative appropriations process funds paid to the State by a tribe under the terms of a compact or amended compact and independently direct the expenditure of those funds.

The proposed amendatory agreement negotiated by the Governor with the Tribe purports to amend Section 17(C) of the Compact to provide that the Tribe's semi-annual payments to the State from its winnings at *both* casinos would no longer be made "*to the Michigan Strategic Fund, or its successor as determined by State law*" but rather "*to the State, as directed by the Governor or designee . . . .*" The

Governor's diversion of these funds runs afoul of Michigan's constitutional and statutory proscriptions on State expenditures.

The laws of Michigan clearly require that all "[r]eceipts of state government *from whatever source derived shall be deposited* pursuant to directives issued by the state treasurer and credited to the proper fund." MCL 18.1441 (Emphasis added) The Constitution further requires that:

> Sec. 17. *No money* shall be paid out of the state treasury except in pursuance of *appropriations made by law*. Const 1963, art 9, § 17 (Emphasis added)

The Michigan Supreme Court has emphasized that the Legislature is the constitutional body charged with making appropriations:

> "Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the legislature, and **not to be surrendered or abridged, save by the constitution itself**, without disturbing the balance of the system and endangering the liberties of the people. The right of the legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means both of their collection and disbursement, is firmly and inexpugnably established in our political system." *Civil Service Comm'n v Auditor General*, 302 Mich 673, 682 (1942) (citation omitted). (Emphasis added)

As the court in *Civil Service Commission* recognized, the "whole subject of finance . . . is placed by the Constitution of this state under the control of the Legislature." 302 Mich at 684.

These constitutional and statutory provisions establish a general rule prohibiting State officials from directing the expenditure of State funds without proper legislative appropriation. The Michigan Attorney General, in OAG, 1953-1954, No. 1835 (September 28, 1954), stated:

> "Payments from the general fund cannot be made except in accordance with legislative action. [citation omitted] . . . Except as restricted by the Constitution, the legislature has the **sole right and power** to appropriate money to the purposes which it deems best. **Desires and ideas of officials in the executive department of government may not prevail against a purpose prescribed by the legislature**." *Id.* at 416-417. (Emphasis added)

The maxim presented in these materials is simple -- only the Legislature may appropriate State funds. The "desires and ideas" of the Governor -- that tribal gaming revenues to the State of Michigan should be distributed exclusively "as the Governor so directs" -- runs counter to the Legislature's

constitutional prerogative and duty to appropriate all State funds by law in such a manner as the Legislature deems to be of most benefit to the State and its citizens.

The proposed amendment to Section 17(C) of the gaming compact with the Odawa Tribe contains no language to ensure that such disbursements are made *"by law"* as required by Article 9, Section 17 and MCL 21.161. The failure to do so renders the amendatory agreement in violation of those mandates because it purports to authorize the Governor to serve as the *sole* arbiter to determine where disbursements from the State Treasury should be directed. Thus, the Governor does not possess the constitutional authority to direct the payment of State funds in the manner contemplated in the Compact Amendment.

This was not an issue under the original 1998 Compact because that Compact required that tribal payments to the State be deposited into the MSF (or successor fund) -- not the State Treasury -- and, therefore, were not subject to the appropriation process. This distinguishing characteristic is critically important. As the Michigan Court of Appeals held in the case of *Tiger Stadium Fan Club v Governor*, 217 Mich App 439 (1996), the original deposit of gaming revenues into the MSF did not run afoul of Article 9, Section 17 because:

> "The payments here are gratuitous payments specifically **designated for the MSF not the state** . . . . We thus conclude that the revenues involved are public funds not subject to appropriation in that they are gratuitous payments negotiated by the Governor and **designated for a specific purpose** and that the payment of those revenues to, and their disbursement from, the MSF without an act of the Legislature does not violate the Appropriations Clause." 452-454. (Emphasis added)

The Michigan Court of Appeals *Tiger Stadium* decision made clear that funds which pass into the hands of a quasi corporation do not automatically become State funds subject to control by the Legislature. However, when such funds are paid to the State -- as the amendatory agreement envisions -- and not to a public corporation, then such funds are subject to appropriation by the Michigan Legislature.

This same distinction was reiterated by OAG, 1978, No. 5393 of 1978 by the Office of the Attorney General wherein the Attorney General opined that if it wishes to authorize the expenditure of donations to the State, the Legislature *must* appropriate such funds.

The tribal payments at issue in the present case are clearly "gratuitous payments," as were the payments in Tiger Stadium, *supra*. However, unlike the 1998 Compact, the amendatory agreement signed by the Governor on July 22 of this year does *not* designate a specific destination such as the MSF but, instead, provides that tribal payments are to be made "*to the State*" and are to be "*directed by the Governor.*" In line with the court's decision in Tiger Stadium, *supra,* and the expressed provisions of MCL 21.161, the failure of the amendatory agreement to specify that the funds are for a particular purpose -- but rather to designate only that those payments are "to the State" -- subjects the disbursement of those revenues to an act of the Legislature under the Appropriation Clause.

The Attorney General's office has also consistently recognized that, with respect to various State officers and agencies, all monies the State receives must be deposited into the State Treasury, to be appropriated by the Legislature in accordance with the law. For example, in OAG, 1977-1978, No. 5393, p 693 (November 18, 1978), the Attorney General found that even grants and gifts to the State intended for a specific State fund may not be expended by any Executive Branch official, except pursuant to proper legislative appropriation prescribing the manner in which such funds are to be spent. Similarly, in OAG, 1983-1984, No. 6119, p 14 (January 20, 1983), the Attorney General determined that a self-sustaining State fund empowered to make assessments against its members could not disburse money it had raised to pay expenses without first having obtained a legislative appropriation as mandated by the Michigan Constitution. *Id.* at 15 (citing numerous Attorney General Opinions).

In none of these opinions did the Attorney General recognize a mechanism whereby funds paid to the State may simply be withdrawn from the State Treasury and expended by an Executive Branch official without any legislative direction or oversight. Rather, the Attorney General consistently reasoned that all moneys given to, or paid to, the State become State Treasury funds which may only be expended pursuant to legislative appropriations. In sum, the Governor has no authority to make an end-run around the legislative appropriation process to divert the portion of the State's tribal gaming revenue to whatever purpose "the Governor so directs." Accordingly, the Administration's attempt to use the compact

amendatory process to circumvent the constitutional appropriation mandates of Article 9, Section 17 and MCL 21.161 is, therefore, unconstitutional and ineffective.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully request that this Court declare and adjudge that the Amendatory Agreement is unlawful and invalid under the Separation of Powers Clause of Const 1963, art 3, § 2, and the mandates of Const 1963, art 9, § 17, governing state appropriations. The *amici curiae*, therefore, request that such agreement be voided and that the pre-existing tribal gaming compact with the Odawa Tribe and the State be declared to remain in effect and unchanged from the date of its original execution in 1998.

Respectfully Submitted,
Senate Majority Counsel Office
Alfred H. Hall (P24477)
Michael G. O'Brien (P44255)
Phillip A. Hendges (P56870)
Pamela S. Haynes (P57358)

By: 
Michael G. O'Brien
Attorneys for
Senate Majority Leader Ken Sikkema and
Senator Shirley Johnson

BUSINESS ADDRESS:

Romney Building, 11th Floor
P.O. Box 30036
Lansing, Michigan 48909
(517) 373-3330

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